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Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1972 No. 72-459

GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA,

and

JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife and HENRY E. CROUTER,

Appellants,

vs.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF CITY OF PHILADELPHIA, AMICUS CURIAE

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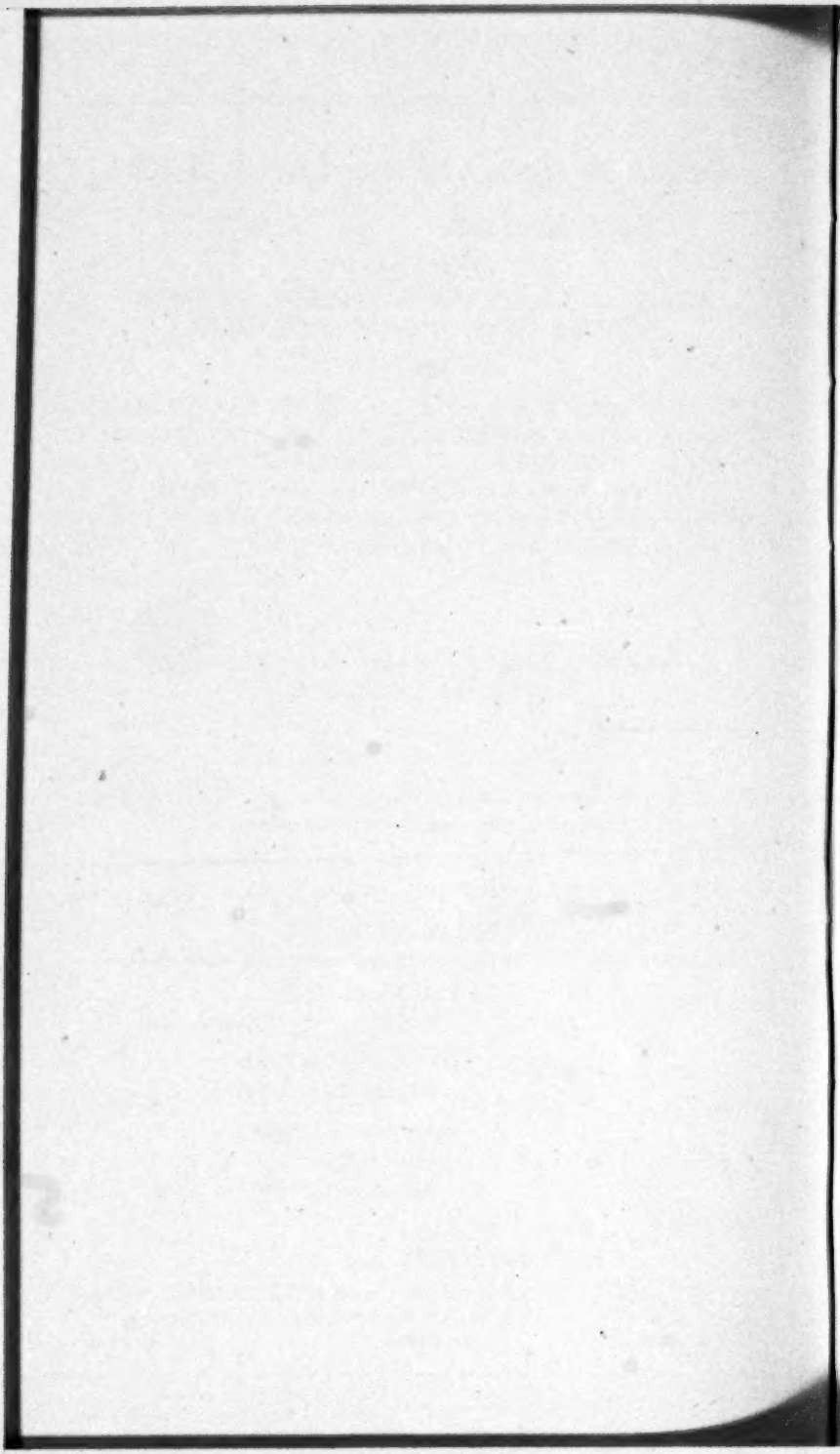

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INTEREST OF THE AMICUS

This brief is submitted on behalf of the City of Philadelphia, a Pennsylvania city of the first class with a population in excess of 1.9 million persons. Philadelphia has a public school population of 261,000 students, and an additional 142,000 students (54% of the public school population) attending nonpublic schools.[1] The brief is sponsored by City Solicitor Martin Weinberg, Esquire, its authorized law officer.

This brief is submitted by your *amicus*, City of Philadelphia, in order to impress upon your Honorable Court the urgency and gravity of the adverse effects of the decision of the court below, on the City of Philadelphia, its nearly 2 million inhabitants, especially, and also on their fellow citizens in Pennsylvania and the nation. Philadelphia respectfully urges this Court to accept jurisdiction and to receive written and oral arguments concerning the constitutionality of Act No. 92 of the Commonwealth of Pennsylvania approved August 27, 1971, 24 P.S. 5701 *et seq.*, known as the Pennsylvania Parent Reimbursement Act for Nonpublic Education.

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[1] Attendance figures for school year ending June, 1972.

STATEMENT OF THE CASE

Pennsylvania Act No. 92 provides partial reimbursement to parents for tuition paid for the education of their children in nonpublic schools. The Act makes the following specific legislative findings of fact:

> ". . . (3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.
>
> (4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

On July 21, 1972, a three-judge District Court in the Eastern District of Pennsylvania, declared the Act unconstitutional and issued an Order perpetually enjoining disbursements to parents under the Act.[2] As a direct con-

[2] *Lemon v. Sloan*, 346 F. Supp. 1356 (1972).

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sequence of this action by the District Court, payments exceeding $10,000,000 have been delayed to Philadelphia parents of nonpublic school children. Timely appeals have been filed on behalf of certain parents, parties below, and the Commonwealth of Pennsylvania. Jurisdictional statements were required to be filed as of October 20, 1972.

This Court has jurisdiction in the matter under 28 U.S.C. § 1253,[3] and the City of Philadelphia is adversely affected by the decision of the lower court in the following ways:

1. The "enormous added financial, educational and administrative burden" recognized by the Commonwealth in its legislative findings, *supra*, falls most heavily upon the City of Philadelphia, the largest urban center in the state. As such, the City is forced to contend with the concentrated and interrelated problems which characterize urban centers throughout the nation at this point in history. Pointing out that nonpublic school attendance is largely an urban phenomenon, the Report of the President's Commission on School Finance[4] declared:

> "One of every 10 American children attends a nonpublic school; the proportion is much higher in urban areas where the nonpublic school is a much more significant part of American education than it is in the Nation as a whole. Roughly 83 percent of all nonpublic school children are found in what are known as Standard Metropolitan Statistical Areas (the cities and their suburbs), and nearly half (47.5 percent) of all nonpublic children attend schools in center cities. Of the total elementary and secondary school enrollment in our 10 largest cities, 24.6 percent is found in nonpublic schools.

[3] Act of June 25, 1948 c. 646, 62 STAT. 928, 28 *U.S.C.A.* 1253.

[4] "Schools, People, and Money, The Need for Educational Reform," Final Report, President's Commission on School Finance, March 3, 1972, U.S. G.P.O. Stock No. 1780-0965, p. 54.

> It is apparent that nonpublic education is largely an urban phenomenon. Inner city nonpublic schools—mainly Roman Catholic, but also Lutheran in many areas—provide a substantial part of the total investment in urban education. And where their existence is threatened by financial and other problems, our cities must confront the prospect of assuming the additional burdens of educating nonpublic children."

The prospect facing the City of Philadelphia at the present moment is a stark one. The transfer of the City's nonpublic school children to the public schools would create a 54% increase in the student population of the public schools. The corresponding increase, expressed in dollars at 199,765,872 in public school operational expenditures alone, would be a staggering blow to the City's taxpayers.[5] These additional expenditures have been estimated for the current fiscal year at $12 million if 10% of the students transfer, and to $153 million if all transfer. The latter figure is projected at $215 million for fiscal year 1974-75.[6]

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[5] The current operating budget for Philadelphia Public Schools is $369,936,800.

[6] In 1972, a nonsectarian committee composed of thirty leading citizens of the Philadelphia area, and representing business, labor, government, education and the community at large, published a voluminous report on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties. This report, popularly known as the "Gurash Report" after its Chairman, John T. Gurash, Board Chairman and Chief Executive Officer of the Insurance Company of North America Corporation, contains a vast amount of data concerning the financial crisis in Catholic and public education today. It is sufficient, for the limited purpose of this brief prior to consideration of the appellants' jurisdictional statement, to cite the following figures which indicate the estimated additional taxes which would be required to meet the additional operating costs which would have to be met by the public schools of Philadelphia reflecting varying rates of transfer of substantial numbers of nonpublic school children to the public schools. The figures have been estimated for the current and succeeding two fiscal years; rates of student transfer are expressed as percentages of the existing Philadelphia nonpublic school population, and the amounts involved reflect millions of dollars.

Fiscal Year	10%	25%	50%	100%
1972-73	$12 million	30	60	153
1973-74	26 million	60	115	175
1974-75	46 million	98	176	215

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2. Massive transfers of students from nonpublic to public schools would create educational chaos. Even if the huge financial problem could be solved, the public schools, already struggling under the effort to educate a quarter of a million students, and, in the process, turning out far too many functional illiterates, would find it impossible to supply the facilities and the trained personnel to provide adequate education, within a reasonable time to an additional 140,000 students. The inevitable effect will be substantial deterioration in the quality of education for all of the children of Philadelphia demanding a further investment of money and people of an incalculable amount.

3. A massive increase in taxes for educational purposes will produce extremely serious strains on the City's budget for all other municipal purposes. The City of Philadelphia, like the School District, (both of whom must look to the same base for their financial means) already faces major deficits in its operating budget. These deficits are the inevitable result of a diminishing base, which is itself due to the vicious circle of urban decay. Urban blight reduces the real estate tax base at the same time that the same blight, coupled with rising tax rates and a steady increase in crime, generates the flight of industry and affluent taxpayers from the City. These conditions, demanding greater and greater expenditures by the City, are also making the collection of the necessary funds more and more difficult. The action of the lower court, in striking down Act No. 92, a statute designed, *inter alia*, to prevent the addition of an "enormous burden" upon the taxpayers, if not reversed, will contribute immensely to this vicious circle.

4. The forced transfer of large numbers of children from nonpublic to public schools will result in incalculable damage to the entire community in terms of human rights and the public peace.

(a) The creation of a monolithic public school system will further depreciate the quality of education by eliminating the only effective competition which serves as a spur to educational achievement.

(b) Their student population swollen by the enforced addition of thousands of children whose parents believe in philosophical, theological and other ideological values differing substantially from those traditionally inculcated by the secular public schools, these public schools will be wracked with divisiveness by the efforts of each group to persuade or compel the school authorities to adopt educational policies consistent with each groups own deeply held values.

(c) The invalidation of Act No. 92 will strike down legislation designed to protect and encourage the constitutionally protected right of parents to control and direct the education of their children. The precious right of parents to choose the teachers to whom they will entrust an important part of that education will be severely restricted so that only the rich will be able to exercise this invaluable civil right, all others being forced to accept the educational philosophy offered by the state controlled schools. In Philadelphia, where under difficult financial conditions, the parents of 140,000 children are still able to exercise this right, the loss of this freedom by so many of its citizens, will be an incalculable human loss to which the City, its people and its government, cannot be indifferent.

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QUESTIONS

The following are a few of the highly significant questions which are raised by this case and which this Court will be asked to consider at the time for written and oral argument:

1. Whether it is a constitutionally proper legislative purpose for a state to provide public funds to enable a parent to exercise his constitutional right to choose the kind of education his child will receive, where the state finds that economic circumstances have otherwise effectively deprived persons of ordinary means, and to a greater degree the poor, of the practical ability to exercise this right of freedom of choice in education?

2. Whether the method employed by a state in a statutory plan to subsidize in part the tuition paid by a parent for the education of his children in other than public schools meets the requirements of the First Amendment, where the subsidy is paid directly to the parent and the governmental authorities administering the funds are forbidden by statute to undertake to regulate or control any aspect of the administration of any school selected by the parent?

3. Whether the presence or absence of any particular religious, philosophical or other ideological content in the curriculum of the nonpublic school (otherwise qualified under state law) chosen by the parent, may be taken into account by government in determining the right of a parent to receive assistance in the form of public funds to defray the expense of providing an education for his child?

4. Whether a citizen, believing himself aggrieved by the presence or absence of state legislation affecting his constitutional right to the free exercise of religion in the

selection of the kind of education he requires for his children, can be prohibited, under the terms of the First Amendment to the United States Constitution, from petitioning the state government for the enactment or repeal of legislation so as to provide for the redress of said grievance, where it appears likely that such petition will meet with strong opposition from other citizens who are of a contrary mind with respect to the merits of the proposed legislation or the validity of the grievance?

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DISCUSSION

In our Statement of the Case, *supra*, we have indicated some of the serious adverse effects which will occur if this Court affirms the decision of the court below.

The profound concern, felt by lawmakers and other citizens, for the survival of pluralism in education, and of the freedom of educational choice inherent therein, has been transformed into a state of alarm as a result of the recent decision of this Court affirming, without oral argument or the filing of briefs, and without opinion, the decision by a three-judge federal court in *Essex v. Wolman.*[7] Although there are a number of distinctions between the statute in *Essex* and our Act No. 92, the lower court's views in that case [8] reflect a disturbing retreat from the policy of "benevolent neutrality" established by prior well reasoned opinions of this Court,[9] and a definite acceptance of the exaggerated theory of "separation-of-church-and-state," in the absolute sense, which has never been adopted, but often specifically repudiated by this Court.[10] The essence of the *Essex* opinion, and of the opinion of the lower court in the instant case, is a strong tendency to emphasize the Establishment Clause at the expense of the Free Exercise Clause, thus substituting hostility for the required neutrality. If this hostile interpretation of the First Amendment is allowed to stand, the effect upon religious liberty and upon the concept of pluralism in American education will be disastrous.

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[7] No. 71-1664, decided October 10, 1972.

[8] 342 F. Supp. 399 (1972).

[9] See *Walz v. Tax Commission*, 397 U.S. 664, 669, 25 L. Ed. 2d 697 (1970) and cases cited; and see *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

[10] See *Walz, supra*, and *Zorach v. Clauson*, 343 U.S. 306, 96 L. Ed. 954 (1952).

The importance of pluralism in the American way has been well expressed by President Nixon in his message to the Congress [11] on March 3, 1970, when he declared:

> ". . . The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.
>
> Should any single school system—public or private—ever acquire a complete nonopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans. . . ."

And the value of pluralism as a safeguard for civil rights was recognized by "The Federalist" two centuries ago:

> "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." [12]

Nevertheless, although this Court has never formally adopted the hard line of hostility in church-state relations, its action in affirming the lower court in *Essex* has con-

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[11] Education Reform: The President's Message to the Congress Proposing a Series of Actions to Improve Elementary and Secondary Education, March 3, 1970. . . .

[12] Cited in *Douglas, William O.*, "Freedom of the Mind," Doubleday & Co., Inc., Garden City, N.Y. (1964).

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founded local and state lawmakers and given rise to deep concern respecting the line between prohibited and permitted forms of public aid for the education of children in schools of the parents' choice. Consequently, it is imperative, for the future of pluralism and educational freedom, and to dispel the divisive confusion generated by the *Essex* decision, that this Court provide full opportunity for a thorough examination of this crucial question by way of oral argument and the presentation of written briefs in the instant case.

It is extremely important, in any discussion of these matters, to distinguish between divisiveness and pluralism. Divisiveness is that state of hostility and conflict which arises, in the presence of differing beliefs, as a result of the unwillingness of some men to tolerate the coexistence, on the basis of equal rights, of other beliefs. Pluralism, on the other hand, is the condition which results when men of differing beliefs agree to live together in peace, on the basis of mutual respect and equal rights. Divisiveness seeks to have one view dominate while repressing those who differ; pluralism seeks to permit many views to exist, side by side, with none established as official, and all free to compete for the minds of men. Divisiveness is incompatible with the American constitutional principle; pluralism is an essential corollary of that principle.

It has been suggested [13] that the continuing effort by parents and other citizens to secure the allotment of a share of the public funds for the education of children in schools other than the public schools, introduces into our society a divisive element which creates bitterness and hostility and divides our people along religious lines to the detriment of civil peace. Consequently, it is argued, the courts must suppress all such efforts by striking down the legislative fruits thereof. Only thus, it is thought, can the unhappy conflict be eliminated; only when the participants

[13] See *obiter dicta* in *Lemon v. Kurtzman*, 403 U.S. 602, at p. 622 to 624, 29 L. Ed. 2d 745 at p. 761 and 762 (1971).

in the struggle (or, at least, those participants who press one side of the issue) become convinced that the continued effort to secure public funds is doomed to failure, will they be induced to cease their struggles, and the divisive conflict brought to an end.

The error inherent in this theory of judicial suppression of fundamental rights is that it assumes the acceptability, among a free people whose governments are founded upon the principle of freedom and justice for all, of the idea of governmental suppression of difference as a legitimate means for the achievement of unity and peace.

This assumption, that a free people, or a substantial portion of them, when faced with the suppression of deeply felt rights by judicial *fiat* or by any other exercise of governmental power, will meekly subside into quiet acquiescence, misreads the temper of parents in a democratic society intent upon the defense, at whatever cost, of their sacred right to select the teachers to whom they will entrust an important part of the education of their children. Denied effective recourse to the courts of justice, parents will transfer their efforts to other forums, and the battle will continue to rage, its bitter effects worsened, however, by the absence of the ameliorating effect of courts of law. Faced by the twin thrusts of spiraling costs and the denial of a fair share of tax funds, and forced thereby to abandon separate schools,[14] parents

[14] In the recent Message to the Congress from President Richard M. Nixon, On March 3, 1970, the President declared:

> "Up to now, we have failed to consider the consequences of declining enrollments in private elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. *In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.* "If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities." (Emphasis supplied.)

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will transfer their struggle to the new arena, the monolithic public school, into which they will have been thus compelled to enroll their children. The school itself will become the new battleground, as each warring group, intent upon defending its own children from the imposition of alien theological, philosophical or other profound concepts of moral and spiritual value, seeks to persuade or coerce the school authorities to adopt educational policies and to select teachers whose fundamental values are consistent with each group's own deeply held values. The struggle for dominance, within the public schools, of one or another set of values, will continue to rage, with immense damage to the children and to the entire society, until one view shall have succeeded in suppressing all the others and in establishing itself as the one official set of values which shall be imposed upon all. This is neither freedom nor justice. It is rather the negation of those principles which motivated the founders of our country and moved them to adopt our Constitution, and especially, our Bill of Rights. The victor in such a struggle will become the established religion and the free exercise of religion will have ceased to be a significant element in the lives of our people.

The attempt to suppress differences by governmental *fiat* (whether by judicial or legislative action, or by the administrative action of the authorities who regulate the common schools), is guaranteed, among a people who still maintain the appetite for freedom, to produce the bitter conflict and hostility which the Founding Fathers strove to prevent when they adopted our Constitution and, especially, those first amendments which are known as the Bill of Rights.

SUMMARY

Pennsylvania's Parent Reimbursement Statute (Act No. 92 of 1971) is a statute carefully designed to secure the right of parents to choose the teachers of their children, in a fashion which avoids excessive entanglement between church and state; all in accord with the language of the United States Supreme Court as expressed in various decisions in which this Court has endeavored to balance the two constitutional principles of free exercise of religion and no establishment of religion; most recently in *Lemon v. Kurtzman, supra.*

In spite of all of this, in spite of the clear language of this Court, and despite the immense economic importance to the education of all of the children in Philadelphia and other great cities and other heavily populated areas, where heavy transfers, forced or otherwise, of students from non-public to public schools will create massive disruptions and insurmountable financial problems for already over-burdened taxpayers struggling to solve the present problems of public education and the mounting problems posed by rising crime and deteriorating housing and other urban problems—despite all of this, the lower court has ignored the plain intention of the legislature and the equally plain language of this Court and, by the simple process of exaggerating the concept of church-state separation, at the expense of religious freedom, has struck down this very carefully drawn legislation. Given the opportunity to present written and oral argument before this Court, your *amicus,* the City of Philadelphia, will show that the court below has seriously and badly misread the Constitution of the United States, the statute here in question, and the prior decisions of this court.

Unless this Court reverses the decision of the lower court, an extremely serious injustice will be perpetuated at

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the expense of hundreds of thousands of parents and children in Philadelphia, even more in Pennsylvania, as well as millions of others similarly situated throughout the country. The chilling effect which the closing of non-public schools would have upon the profoundly important civil rights of parents who would be thus deprived of their freedom of religion and of the mind through the demise of the heretofore Constitutionally protected right to choose the teachers of their children, will constitute a massive blow at human freedom and human dignity in America. The resulting economic burden which will be forced upon all of the taxpayers of Philadelphia and other areas of the country, by wholesale transfers of students to public schools, with the ensuing chaos, will create an immense barrier to effective education for all of the children of America.

CONCLUSION

For these reasons, your *amicus*, the City of Philadelphia, respectfully urges your Honorable Court to note probable jurisdiction and to set the matter down for oral argument at the next available list.

Respectfully submitted,

/s/ James L. J. Pié
Deputy City Solicitor

/s/ Joseph J. Carlin
Deputy City Solicitor

/s/ Martin Weinberg
City Solicitor